No. 86-1410

In the Supreme Court of the United States

OCTOBER TERM, 1986

HUNTER DOUGLAS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner is precluded from raising in this Court an issue that was not raised before the National Labor Relations Board.

2. Whether, assuming that the question is properly presented, a ruling by a district court in an interlocutory proceeding that there was no reason to believe that a layoff of workers violated Section 8(a)(1) and (3) of the National Labor Relations Act precluded the Board from later finding such a violation in deciding the case on the merits.

3. Whether substantial evidence supported the Board's decision that petitioner violated Section 8(a)(1) and (3) of the Act by discharging most of its second shift employees because of their union activity.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. la-30a) is reported at 804 F.2d 808. The opinion and order of the National Labor Relations Board (Pet. App. 85a-96a), including the decision of the administrative law judge (Pet. App. 57a-80a), are reported at 277 N.L.R.B. No. 123.

JURISDICTION

The decision of the court of appeals was entered on November 6, 1986. The order of the court of appeals denying rehearing was entered on December 2, 1986 (Pet. App. 101a). The petition for a writ of certiorari was filed on February 28, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a manufacturer and distributor of window coverings and their components. In addition to assembling the window coverings at its own plants, it supplies components to fabricators, who then assemble and sell the coverings. This case involves petitioner's Maywood, New Jersey, plant, one of several that it maintains throughout the United States. Prior to October 1984, petitioner operated two shifts at the Maywood plant. Sixty-three employees worked on the first shift, and 42 worked on the second. Pet. App. 3a, 59a, 87a.

In August 1984, a second shift employee contacted the Union's[1] business agent and told him that the Maywood plant employees wanted to form a union. Four meetings were held during August, September, and October 1984, and union authorization cards were handed out at one of the meetings. Also during that period, union leaflets were distributed at the plant. Pet. App. 3a-4a.

Late in August or early in September of 1984, petitioner learned of the campaign to organize a union. Shortly thereafter, plant manager John Santalla established employee committees with whom he met on several occasions. Employee concerns relating to pay, medical insurance, and working conditions were discussed at the meetings, and Santalla promised to try to resolve the employees' problems. At one of the meetings Santalla questioned the employees as to whether their previous employers had had a union. At another meeting, Santalla distributed to the employees a list of proposed shop rules that prohibited, inter alia, distribution of literature in plant working areas and solicitation of employees while either the soliciting or solicited employee was on working time. Pet. App. 4a.

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[1] Local 404, United Electrical, Radio & Machine Workers of America.

During the organizational campaign, Santalla interrogated employee Victor Nunez on two occasions about union activity at the plant and about Nunez's involvement in such activity. He told Nunez to keep the conversations confidential. In addition, Santalla instructed second shift supervisor Jose Algarin to "get rid of" an employee whom Santalla suspected was involved with the Union. Santalla further instructed Algarin to let him know who was involved in the union campaign, remarking that he believed the union organizational effort was coming from the second shift. Pet. App. 4a-5a, 61a, 72a-73a.

During the spring and summer of 1984, petitioner decided to discontinue its retail sale of coverings and to limit its activity to producing component parts and selling them to fabricators. In August 1984 it implemented that decision by notifying its retail customers that, effective September 1, 1984, it would discontinue accepting orders. Around Labor Day, J.C. Penney, one of petitioner's licensed fabricators, advised petitioner that it had oversold its capacity and therefore needed assistance in manufacturing blinds. Initial orders from Penney arrived early in September. On October 18, 1984, petitioner learned that Penney had decided to discontinue further orders. Five days later, in response to the loss of the Penney orders, George Shouldis, petitioner's Vice President and General Manager, instructed John Brown, Director of Manufacturing, to develop a plan to reduce Hunter Douglas's manpower needs. That same day, Brown, after consultation with Santalla, recommended elimination of the second shift. The following day, second shift supervisor Algarin and 35 of the 42 second shift employees were terminated. Pet. App. 5a-6a, 63a.

On October 29, 1984, petitioner received a Union request for recognition as the representative of petitioner's production and maintenance employees. Petitioner rejected that

request, and the Union then filed three unfair labor practice charges. Those charges were consolidated in a complaint issued by the Regional Director. Pet. App. 6a-7a, 65a.

2. Following a hearing, an Administrative Law Judge (ALJ) found that petitioner violated Section 8(a)(1) and (2) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(1) and (2), by establishing employee committees, soliciting grievances, granting benefits, and promulgating no-solicitation and no-distribution rules, all for the purpose of interfering with the employees' organizational rights. On appeal, the National Labor Relations Board (the Board) affirmed those rulings. Two rulings of the ALJ, however, were overturned by the Board. First, contrary to the ALJ, the Board found that petitioner violated Section 8(a)(1) of the Act by interrogating Nunez. Second, the Board found, again contrary to the ALJ, that petitioner violated Section 8(a)(1) and (3) by terminating the various second shift employees in order to impede union activity. Pet. App. 7a-8a, 65a-68a, 86a, 90a-91a.

The latter finding by the Board is the only one that petitioner challenges in this Court (Pet. 5 n.1).[2] In disagreeing with the ALJ,[3] the Board concluded that "[t]he General Counsel made a prima facie case * * * that union animus was a motivating factor in [petitioner's] layoff of second-shift employees, and [petitioner] has failed to show by a preponderance of the evidence that those employees would

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[2]In its appeal to the Third Circuit, petitioner similarly did not contest the Board's findings that it had unlawfully established employee committees, solicited grievances, granted benefits, and promulgated no-solicitation and no-distribution rules (Pet. App. 21a).

[3]The ALJ concluded that petitioner demonstrated that it would have terminated the second shift for business reasons even in the absence of protected activity. He did not determine whether the General Counsel had made a prima facie showing that protected conduct was a motivating factor in the decision. Pet. App. 7a, 71a-72a.

have been laid off in the absence of union activity and [petitioner's] animus" (Pet. App. 92a). In reaching its decision, the Board pointed to "[t]he abruptness of the layoff, coming as it did at the time of the union drive * * *" (*id.* at 90a). In addition, after noting that petitioner's decision to eliminate the second shift was based on the recommendation of Santalla, the Board stated that "Santalla's undisputed desire to rid the second shift of its union sympathizers goes a long way in explaining how and why the second shift was eliminated in the manner in which it was" (*ibid.*). In rejecting petitioner's assertion that its decision to abolish the second shift was based on business considerations, the Board concluded that those reasons "fail[ed] to explain why [petitioner] deviated from its previous practice of considering individual seniority or qualifications" of employees to be selected for layoff rather than eliminating employees simply because they were on a particular shift (*id.* at 89a-90a (footnote omitted)). The Board added that "[c]onsidering that [petitioner's] officers * * * had discussed personnel reorganization for some time, and considering that Penney's withdrawal of further orders was not seen as catastrophic, it is not credible that [petitioner] would accept Santalla's recommendation and act upon it with such great haste" in the absence of Union activity (*id.* at 90a).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. 3a-21a). The court found that substantial evidence supported the Board's finding that the layoff of the second shift would not have occurred as it did were it not for petitioner's desire to impede union activity (*id.* at 19a). In so concluding, the court cited the "timing and nature of the discharge" and petitioner's knowledge of the union activity (*id.* at 14a). It stated that petitioner's explanation of the timing was "implausible" and that "the manner of implementing the abrupt layoff departed from the company's past practice of reassigning employees to other shifts" (*ibid.*). It further noted that over 90 percent of

the second shift employees had signed union authorization cards and that the union-related activities were carried out mainly by second shift employees (*id.* at 15a).[4]

The court rejected petitioner's contention that the Board's findings should be subjected to more exacting scrutiny because the Board had disagreed with the ALJ. It observed that the Board's disagreement was not over credibility determinations but over the inferences to be drawn from the facts, and that heightened scrutiny was therefore not required. Pet. App. 8a-11a.

Finally, the court rejected petitioner's claim that it should take into consideration, in reviewing the Board's decision, a ruling by a district court judge denying, in relevant part, the General Counsel's petition for interim relief pursuant to Section 10(j) of the Act, 29 U.S.C. 160(j) (Pet. App. 17a n.1).[5] It noted that the 10(j) proceeding "[was] not under review, and hence [could not] affect [its] determination" (*ibid.*).

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[4]In addition, the court observed that the Board had not rejected petitioner's position that some form of work reduction would have resulted from the change in marketing strategy, but rather had concluded that petitioner had not shown "that the timing and nature of the reduction that did occur resulted from business reasons * * * rather than from an attempt to discourage unionization" (Pet. App. 17a-18a (citation omitted)). The court also indicated that petitioner's economic data did not support the need for an abrupt layoff, since "[t]he plant continued to be busy after the layoff, and the remaining first-shift workers were given the opportunity of working overtime '[j]ust about every day' until two to three weeks before Christmas" (*id.* at 18a (citation omitted)). The court added that the evidence did not support petitioner's assertion that "lower productivity on the second shift was the cause of its elimination" (*id.* at 19a).

[5]The petition for Section 10(j) relief was filed after the administrative hearing was held but before the ALJ's decision was rendered. It was decided based on the record of the hearing. Pet. App. 35a-36a, 41a. The district court granted the relief sought except with respect to the reinstatement of the second shift employees and the second shift supervisor. On the latter issue, the court stated that the General Counsel had "not

Judge Weis dissented. In his view, the Board's findings should have been subjected to heightened scrutiny because the Board's decision was contrary to that of the ALJ (Pet. App. 21a-22a). Examining the record, he concluded that the Board's rulings at issue were unsupported by substantial evidence (*id.* at 23a-30a). The court subsequently denied rehearing en banc (*id.* at 101a).

ARGUMENT

1. Petitioner asserts (Pet. 10-15) that the district court's finding in the interlocutory Section 10(j) proceeding that there was "no reasonable cause" to believe that the layoff of the second shift employees violated the Act precluded the Board, as a matter of law, from making a contrary finding in adjudicating the case on the merits, since the same record was involved. Even though this is its principal basis for seeking review by this Court, petitioner failed to raise this claim in the proceedings before the Board. To the contrary, it conceded in its brief to the ALJ (Pet. ALJ Br. 13) and again in its court of appeals brief (Pet. C.A. Br. 26) that the district court's findings were *not* binding but merely "persuasive." [6] Since petitioner failed to raise the issue at the administrative level, and since it has offered no "extraordinary circumstances" to excuse such failure, the courts may not consider the claim. See 29 U.S.C. 160(e) and (f); *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 311-312 n.10 (1979); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).

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carried his burden of reasonable cause in light of respondent's defense of legitimate business reason, and that the public interest will be best served by entrusting the issue of the reinstatement of these employees to the administrative expertise of the NLRB" (*id.* at 53a).

[6]Petitioner's brief to the Board made no mention whatsoever of the alleged preclusive effect of the district court's decision. It was not until petitioner filed for rehearing in the court of appeals that it asserted the issue-preclusion argument (Pet. for Reh'g 11-14).

In any event, petitioner's argument is without merit. The cases cited by petitioner (Pet. 11) do not support its preclusion argument or its claim of a conflict among the circuits. In *Walsh* v. *International Longshoremen's Association*, 630 F.2d 864, 868 (lst Cir. 1980), the court stated that the denial of a Regional Director's application for interim relief, while res judicata as to subsequent petitions for interim relief based on the same alleged violation, has no preclusive effect in a proceeding on the underlying charge before the Board. Similarly, in *NLRB* v. *Acker Industries, Inc.*, 460 F.2d 649 (10th Cir. 1972), the court held that a district court's findings in a 10(j) proceeding have no effect in the proceedings before the Board on the underlying complaint. The court noted (*id.* at 652) that there was a "categorical difference between the nature of an injunctive hearing and a definitive hearing on the merits." In *Cosentino* v. *Local 28*, 268 F.2d 648 (8th Cir. 1959), the court held only that the denial of a petition for interim relief because of the Board's failure to conduct a preliminary investigation before charges were filed was not an adjudication on the merits and did not bar a subsequent petition arising out of the same labor dispute. The court declined to reach the issue whether principles of res judicata were applicable to proceedings for interim relief (*id.* at 652). Finally, *National Airlines, Inc.* v. *International Association of Machinists & Aerospace Workers*, 430 F.2d 957, 960 (5th Cir. 1970), cert. denied, 400 U.S. 992 (1971), arose under a different statute (the Railway Labor Act, 45 U.S.C. 151 *et seq.*) and has no relevance here. The court held merely that the district court was bound by the terms of a prior remand from the court of appeals that had conclusively settled the matter in dispute.

Moreover, petitioner's preclusion argument is belied by the district court's decision itself. The court made clear its understanding that it had not resolved the merits, but rather, that it was "entrusting the issue of the reinstatement

of these [second shift] employees to the administrative expertise of the NLRB" (Pet. App. 53a).[7]

2. Petitioner also asserts (Pet. 20) that the court of appeals erred in holding that the Board's decision was supported by substantial evidence. Specifically, it contends that the court "tolerate[d] the Board's premature shifting of the burden of proof" and that it failed to apply heightened scrutiny in reviewing the Board's conclusion that petitioner's elimination of the second shift was motivated by union animus. Those contentions lack merit.

In *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 395, 403-404 (1983), this Court approved the Board's *Wright Line*[8] test. Under that test, the General Counsel must first make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once that is established, the employer can still avoid a finding that it violated the statute by demonstrating that the same action would have taken place even in the absence of the protected conduct. The Board properly applied that test here. It expressly found that the General Counsel made a prima facie case and that petitioner failed to prove by a preponderance of the

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[7]In a variation of its first argument, petitioner asserts (Pet. 15-17) that the failure of the court of appeals to consider the district court's findings constituted a refusal to "consider the record as a whole." That argument likewise lacks merit. District court findings with respect to applications for interim relief "are only effective to the extent they support the granting or denial of the interlocutory relief there in issue" (*Acker Industries*, 460 F.2d at 652). The reason for such a limitation is that "the purpose of the hearing [is] directed to interlocutory relief only, and the trial court [makes] its findings for that purpose only" (*ibid.*). Because of the very different purpose of a Section 10(j) proceeding, there is no basis for petitioner's assertion that the court of appeals was somehow obligated to give weight to the district court's 10(j) ruling.

[8]*Wright Line*, 251 N.L.R.B. 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S 989 (1982).

evidence that it would have laid off the second-shift workers in the absence of union activity. Pet. App. 86a, 90a-92a.[9] Accordingly, there is no merit in petitioner's claim that the Board prematurely shifted the burden of proof.

Similarly, petitioner's contention (Pet. 20) that the court of appeals should have reviewed the Board's decision "under a stricter level of scrutiny" is based on its erroneous view that the Board overturned credibility findings of the ALJ. As the court of appeals noted (Pet. App. 10a), however, "the Board did not make credibility findings that differed from the ALJ" but only drew different inferences from the proven facts. Thus, under well-settled principles, there was no occasion for the court to apply a heightened level of scrutiny in reviewing the Board's decision. See, *e.g.*, *Consolidation Coal Co.* v. *NLRB*, 669 F.2d 482, 488 (7th Cir. 1982); *Penasquitos Village, Inc.* v. *NLRB*, 565 F.2d 1074, 1078-1079 (9th Cir. 1977); *NLRB* v. *Interboro Contractors, Inc.*, 388 F.2d 495, 501 (2d Cir. 1967).

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[9]Petitioner asserts (Pet. 19) that the Board offered "no factual support for its determination" that the General Counsel made out a prima facie case, but instead "proceeded directly" to requiring petitioner to prove that it would have acted the same in the absence of union activity. As described on pages 4-5, *supra*, however, the Board set out several reasons why it found that petitioner was motivated by union animus. Petitioner's assertion (Pet. 19) of an inter-circuit conflict or a conflict with this Court's *Transportation Management Corp.* decision therefore lacks merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1987